No. 2237

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United States

Circuit Court of Appeals

For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX TO PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

W. W. COTTON, Esq., A. C. SPENCER, Esq., FRED E. BUTLER, Esq., W. A. ROBBINS, Esq., Portland, Oregon,

Messrs. HAMBLEN & GILBERT, Spokane, Wash., Attorneys for Plaintiff in Error.

C. H. LINGENFELTER, Esq., Boise, Idaho, Attorney for Defendant in Error.

In the District Court of the United States Within and for the District of Idaho, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant.

Complaint.

Comes now the plaintiff, the United States of America, by C. H. Lingenfelter, United States Attorney for the District of Idaho, acting in this behalf by the direction of the Attorney General of the United States, and complains of the defendant, The Oregon-Washington Railroad & Navigation Company, and alleges:

1st. That at all times hereinafter mentioned the Oregon-Washington Railroad & Navigation Company was and is a corporation organized and existing under and by virtue of the laws of the State of

Oregon, engaged in business as a common carrier in interstate commerce and operating a line of railroad extending from the State of Oregon into the States of Washington and Idaho.

2d. That said railroad forms a part of a line of road over which passengers and freight, including mules, horses, cattle, sheep, swine and other animals, are conveyed between, into and through the states hereinbefore mentioned.

3d. That heretofore, to wit, on or about the 6th day of March, 1912, the defendant received at Endicott in the State of Washington for shipment to Wallace, Idaho, certain [1*] swine, to wit, one carload consigned by John Daubert to Mahoney Bros. on the following car, to wit, O. S. L. 12,890, and thereupon the defendant conveyed said stock on or over its line aforesaid as a common carrier in the same car aforesaid to its station at Wallace, Idaho; that said stock aforesaid was loaded at 11:30 o'clock A. M. on said date of March 6, 1912, at Endicott as aforesaid, and unloaded at 30 minutes past 7 o'clock A. M. at Wallace, Idaho, on the 8th day of March, 1912; that said stock was continuously confined in said car from the time of its loading as aforesaid to the time of the unloading as aforesaid at Wallace, Idaho, while in transit on and over the line of said defendant without food, water, rest or unloading, a period of 44 consecutive hours.

4th. That from the time the said animals were first loaded at Endicott, Washington, as aforesaid, said animals had been continuously confined in the

*Page-number appearing at foot of page of original certified Record.

said car without unloading, feeding, watering or resting, knowingly and wilfully by the said defendant for a longer period than 28 consecutive hours, to wit, for a period of 44 consecutive hours.

5th. That by reason of the foregoing, said defendant became and was and now is liable to the plaintiff, the United States of America, as penalty in the sum of Five Hundred Dollars.

WHEREFORE, the plaintiff demands judgment against the said defendant for the sum of Five Hundred Dollars, together with costs and disbursements of suit.

C. H. LINGENFELTER,
United States Attorney for the District of Idaho, and
Attorney for Plaintiff, Residing at Boise, Idaho.

[2]

State of Idaho,
County of Ada,—ss.

C. H. Lingenfelter, being first duly sworn, on oath deposes and says that he is the United States Attorney of the District of Idaho, and as such makes this affidavit for and on behalf of the plaintiff. That he has read the above and foregoing complaint and knows the contents thereof, and that he believes the facts stated in said complaint to be true.

C. H. LINGENFELTER.

Subscribed and sworn to before me this 10th day of April, 1912.

A. L. RICHARDSON,
Clerk of the United States District Court.

[Endorsed]: Filed April 10, 1912. A. L. Richardson, Clerk. [3]

In the District Court of the United States for the District of Idaho, Northern Division.

No. 437.

THE UNITED STATES OF AMERICA

vs.

THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation.

Summons.

The President of the United States, to The Oregon-Washington Railroad & Navigation Company, a Corporation, the Above-named Defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Coeur d'Alene in said District, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this Summons upon you, if served within the Northern Division of said District, or if served within any other Division of said District, then within forty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will apply to the Court for the relief demanded in the complaint, to wit:

For judgment in the sum of Five Hundred Dollars, together with costs and disbursements of suit.

The facts more fully appearing in plaintiff's complaint, a certified copy of which is served herewith, hereby referred to and made a part hereof.

And this is to COMMAND you, the MARSHAL

of said district, or your DEPUTY, to make due service and return of this Summons. Hereof fail not.

Witness the Honorable FRANK S. DIETRICH, Judge of the District Court of the United States, and the seal of said Court, affixed at Boise, in said District, this 11th day of April, 1912.

[Seal] A. L. RICHARDSON,
Clerk.

This is to certify that I received the within summons together with a certified copy of the complaint at Lewiston, Idaho, on the 15th day of April, 1912; and served the same on The Oregon-Washington Railroad & Navigation Company, a corporation, on the 16th day of April, 1912, at Lewiston, Nez Perce County, Idaho, by handing to and leaving with C. W. Mount, agent of The Oregon-Washington Railroad & Navigation Company, a corporation, a duplicate of the within summons together with a certified copy of the complaint.

Dated April 16th, 1912.

S. L. HODGIN,
U. S. Marshal.
By Wm. Schuldt,
Deputy.

U. S. District Attorney, Boise, Idaho, Attorney for Plaintiff.

[Endorsed]: No. 437. In the District Court of the United States for the District of Idaho, Northern Division. The United States of America vs. The Oregon-Washington Railroad & Navigation Co. Summons. Returned and filed April 29, 1912. A.

L. Richardson, Clerk. By ————, Deputy Clerk. [4]

In the District Court of the United States Within and for the District of Idaho, Northern Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant.

Answer.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, and for answer to plaintiff's complaint admits, denies and alleges as follows, to wit:

I.

Admits the allegations contained in paragraph one of the complaint.

II.

Admits the allegations contained in paragraph two of the complaint.

III.

Denies each and every allegation contained in paragraph three of the complaint, except that defendant admits that on the sixth day of March, 1912, John Daubert delivered to the defendant at Endicott, Washington, a shipment of hogs, loaded in O. S. L. car No. 12,890, consigned to Mahoney Bros. at Wallace, Idaho. Admits the shipment was loaded at En-

dicott at 11:30 A. M. on said date; admits that said shipment was transported over [5] said defendant's line of railroad from Endicott, Washington, to Wallace, Idaho, but this defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not said shipment was not unloaded until 7:30 A. M. on the eighth day of March, 1912, and therefore denies the same, and the whole thereof, and alleges that said shipment moved as hereinafter set forth.

IV.

Denies each and every allegation contained in paragraph four of the complaint.

V.

Denies each and every allegation contained in paragraph five of the complaint.

For a further and separate answer in defense to plaintiff's complaint defendant alleges:

I.

That heretofore and on the sixth day of March, 1912, Jno. Daubert delivered to the defendant, Oregon-Washington Railroad & Navigation Company, at Endicott, Washington, a shipment of hogs, the exact number of which is unknown to this defendant, for transportation over its line of railroad from Endicott, Washington, to Wallace, Idaho, and there to be delivered to Mahoney Bros. as consignee; that said hogs were loaded by Jno. Daubert into O. S. L. car No. 12,890 at the hour of 11:30 A. M. on said March 6th, 1912.

II.

That said shipment was thereafter transported in

due course of business from Endicott, Washington, to Tekoa, Washington, and arrived there at the hour of 6:05 P. M. on March 6th, 1912; [6] that at said time and place the consignor, Jno. Daubert, who had the custody of and was personally in charge of said shipment, executed and delivered to the defendant, Oregon-Washington Railroad & Navigation Company, a written request, signed by himself, which request was separate and apart from any printed bill of lading or other railroad form, authorizing the Oregon-Washington Railroad & Navigation Company to confine said stock for a period of thirty-six hours in a car without unloading into pens for feed, water and rest, as required by the Act of Congress of June 29th, 1906.

III.

That thereafter and in due course of business said hogs were transported from Tekoa, Washington, to Wallace, Idaho, and arrived there at the hour of 9:00 P. M. on March 7th, 1912, and said car was immediately delivered to the shipper and man in charge and spotted for unloading at a properly equipped stock-pen with full notice and knowledge on the part of said Jno. Daubert, the person in charge of said stock, that for reasons, unknown to this defendant, said man in charge of said shipment failed and neglected to unload same within the time required by law, although said shipment was spotted and ready for unloading two hours and twenty minutes prior to the expiration of thirty-six hours from and after 11:30 A. M., March 6th, 1912; that this defendant had no notice or knowledge that said man in charge of the

shipment was not unloading the stock into the pens until after the expiration of the time limited by law.

WHEREFORE, having fully answered plaintiff's complaint herein, defendant demands that this action be dismissed and it have and recover its costs and disbursements herein.

A. C. SPENCER,
FRED E. BUTLER,
W. A. ROBBINS,
Attorneys for Defendant. [7]

State of Oregon,
County of Multnomah,—ss.

James G. Wilson, being first duly sworn, deposes and says that he is Assistant Secretary of the defendant herein, Oregon-Washington Railroad & Navigation Company; that he has read the foregoing Answer, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters as are therein stated to be on his information and belief and as to those matters he believes it to be true.

JAMES G. WILSON.

Subscribed and sworn to before me this 14th day of May, 1912.

[Seal]

P. C. WOOD,
Notary Public for Oregon.

[Endorsed]: Filed May 15, 1912. A. L. Richardson, Clerk. By M. W. Griffith, Deputy. [8]

United States District Court, Northern Division, District of Idaho.

No. 437.

THE UNITED STATES,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff.

M. J. McHUGH,
Foreman.

[Endorsed]: Filed May 29, 1912. A. L. Richardson, Clerk. [9]

In the District Court of the United States Within and for the District of Idaho, Northern Division.

No. 437.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Judgment.

In this cause it appearing to the Court that on the 29th day of May, 1912, a jury duly empaneled, found

for the plaintiff, in the above-entitled court, in said cause:

Now, therefore, it is ordered, adjudged and decreed that the plaintiff, the United States of America, do have and recover of and from the defendant, the Oregon-Washington Railroad & Navigation Company, a corporation, the sum of Two Hundred Dollars, being the amount assessed by the Court as a penalty, as provided by law; and further, the sum of $54.70, as costs.

Dated June 6, 1912.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed June 6, 1912. A. L. Richardson, Clerk. [10]

In the District Court of the United States in and for the District of Idaho, Northern Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant.

Stipulation Extending Time for Serving Proposed Bill of Exceptions.

IT IS HEREBY STIPULATED and agreed by and between the above-named plaintiff and above-named defendant, through their respective attorneys, that the time within which the above-named defend-

ant may prepare, serve and file its proposed Bill of Exceptions in the above-entitled cause be extended to July 15th, 1912.

C. H. LINGENFELTER,
United States Attorney,
Attorney for Plaintiff.
By H. C. MILLS, Asst.
W. W. COTTON, and
HAMBLEN & GILBERT,
Attorneys for Defendant.

[Endorsed]: Filed July 12, 1912. A. L. Richardson, Clerk. [11]

In the District Court of the United States for the District of Idaho, Northern Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant.

Stipulation [Concerning Bill of Exceptions].

IT IS HEREBY STIPULATED AND AGREED, by and between plaintiff and defendant in the above-entitled cause, by their respective attorneys, that the Bill of Exceptions hereto attached embodies all of the exceptions proposed by either party hereto in said cause and that there are no amendments or proposed amendments thereto; that the said Bill of Exceptions may be settled by the Judge of said Court

in the manner provided by the rules of said Court, without further objection by either party hereto.

Dated this 28th day of October, 1912.

C. H. LINGENFELTER,
United States District Attorney,
Attorney for Plaintiff.

W. W. COTTON,
HAMBLEN & GILBERT,
Attorneys for Defendant, Oregon-Washington Railroad & Navigation Co. [12]

In the District Court of the United States for the District of Idaho, Northern Division.

AT LAW—No. 437.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the 29th day of May, 1912, at Coeur d'Alene, Idaho, the above-entitled action came regularly on for trial before the Honorable Frank S. Dietrich, plaintiff appearing by C. H. Lingenfelter, United States Attorney, the defendant appearing by W. A. Robbins and W. S. Gilbert; a jury was duly empaneled and sworn to try the cause; whereupon counsel for the respective parties stipulated that this case and case No. 438 should

be consolidated for the purpose of trial, separate verdicts to be rendered in each case; whereupon the following proceedings were had;—

The plaintiff produced witnesses whose testimony showed that the car of hogs in question were loaded on the car at Endicott, Washington, at 11:30 A. M., on the 6th of March, 1912, consigned over the railroad line of the defendant to Mahoney Bros., at Wallace, Idaho; that said car of hogs was accompanied by John Daubert as care-taker in charge of said shipment; that a thirty-six hour release was executed by Daubert; that the shipment arrived at Wallace, Idaho, on March 7th, at about eight o'clock P. M., that the hogs remained in the car all night of March 7th, and were not unloaded until the morning of the 8th, at about 9:30 A. M., at Mahoney Bros. stockyard, having been transferred on the morning of the 8th to the N. P. Ry. Co., at Wallace, Idaho, for delivery to the [13] stockyards of Mahoney Bros., which were located on the line of the N. P. Ry. Co., at Wallace, Idaho.

Testimony of John Daubert, for Plaintiff.

One JOHN DAUBERT testified that on the evening of March 7th, 1912, at eight P. M., when the car of hogs arrived at Wallace, that he left the car and notified Mr. Mahoney, and told him the car was in Wallace, and told him to take care of it; that Mr. Mahoney told him that he would take care of the car, and that he did not know what was done with the car of hogs thereafter.

He further testified as follows: "The reason I went with the car of hogs was, the O. W. R. & N.

(Testimony of John Daubert.)

agent at Endicott wouldn't allow the car of hogs to go without a man going with them. I don't know whether it is customary in the shipment of hogs for a caretaker to go along with them. That seems to be the custom with us down there. He won't allow them to go out unless a man goes along with them. The purpose I went along with them for was to look after them in a general way and see that they reached their destination and when they arrived notify the consignee. When the train pulled into Wallace, on the night of the 7th, it stopped around the depot somewheres and the first thing I did afterwards, I left the train and hunted up Mahoney Bros. I went to their house and found them. It was perhaps fifteen minutes after the train arrived that I found Mahoney Bros., and I told them that the car of hogs had arrived and to take care of them. As to where the car was to be spotted, I told the conductor on the train to spot them in the stockyards and he said he would. I don't remember when he said he would. I can't remember whether I told Mr. Mahoney that the car would be spotted at the stockyards. I think that I did. I am pretty positive that I did. I told him the time was pretty near up to unload them; told him it was up at nine o'clock. I told Mr. Mahoney I had signed a thirty-six hour release, and that the time would be [14] about nine o'clock and it was because the time was short that I took the trouble to go up there and tell him about the car personally. After I went up to see Mahoney

(Testimony of Alexander D. Wallace.)

Bros., I went to bed. I relied upon Mahoney Bros.' statement that they would look after the shipment."

Testimony of Alexander D. Wallace, for Plaintiff.

One ALEXANDER D. WALLACE testified that he was in the employ of Mahoney Bros. at Wallace, Idaho, at the time of the arrival of the car of hogs. That he thought the car was sealed. That when cars of stock are spotted at Mahoney Bros. yards he usually broke the seal with instructions from Mahoney Bros. to unload the car. That he never broke the seal without having instructions to unload and that he took his instructions from Mahoney Bros.

He further testified: "I have never seen any of the railroad employees come around there and break the seals. The breaking of the seal has always been done by some employee of Mahoney Bros."

[Testimony of David Franklin Norris, for Plaintiff.]

DAVID FRANKLIN NORRIS, witness for plaintiff, testified:

"I was in Wallace about March 7 of this year; remember a shipment of hogs in charge of Mr. John Daubert arrived at Wallace. I know that the time the train arrived was between the hours of eight and nine o'clock that evening, on the evening of March 7, 1912. After the car reached Wallace there was a certain amount of regular ordinary switching done, and about nine forty-five that same evening the car was spotted at the O. W. R. & N. stockyards in the O. W. R. & N. switchyards, in Wallace, Idaho. I left the car then and the next morning about six thirty-five the car was still in the *shoots* in the O. W.

(Testimony of Alex. D. Wallace.)

R. & N. stockyards, and was not unloaded. It was unloaded the next morning at nine thirty." [15]

[Testimony of Alex. D. Wallace, for Plaintiff.]

ALEX. D. WALLACE, a witness for plaintiff, testified:

"I was in Wallace on the 8th day of March last year and remember a carload of hogs arrived at Wallace about that date. I know of a car arriving on the morning of the 8th. It was spotted at the Mahoney slaughter-house when I seen it and contained hogs. The car was unloaded about eight o'clock on the morning of the 8th. It was the only car that arrived on that date. The car was delivered to Mahoney Bros. about seven-forty on the morning of the 8th of March. It is customary for Mahoney Brothers to always receive the stock in their own pens and not at the pens of the railroad company. This particular shipment was received at seven-forty on the morning of the 8th."

The COURT.—Where is this slaughter-house of Mahoney Brothers, relative to the stockyards of this defendant company?

A. It is about a mile or a mile and three-quarters, what they call nine mile, on a branch of the N. P. road.

The COURT.—Isn't it on the line of railroad of this company?

A. Not on the O. W. R. & N. They are transferred over. They set them over on the switch, as I understand it, and the N. P. switches them to Mahoney's stockyards. That is where I get my instructions from, from Mahoney's.

Recital Relative to Defendant's Motion for Nonsuit.

Thereupon the plaintiff rested its case and the defendant made the following motion for nonsuit:

[Motion for a Nonsuit.]

"Comes now the defendant, the O. W. R. & N. Company, and moves the Court for a judgment of nonsuit herein, on the ground and for the reason that the plaintiff has failed to prove a sufficient case for the jury, in this:

1. The evidence shows that John Daubert, the man in charge of said stock, executed a thirty-six hour release at Tekoa, Washington, on March 6th, 1912; that the shipment was spotted [16] there ready for unloading at properly equipped pens, at Wallace, Idaho, before the expiration of the statutory limit; that the failure to unload said stock was due to unavoidable causes, which could not be anticipated or avoided by the exercise of due diligence and foresight, in that the man in charge of the stock abandoned them after the car was spotted, and the defendant had no notice thereof until after the expiration of the thirty-six hours.

2. The car was spotted and ready for unloading at Wallace more than three hours prior to the expiration of the statutory limit, and the failure to unload was due to the fact that the man in charge and the consignee had some misunderstanding about unloading, of which defendant had no notice until after the expiration of thirty-six hours, and the same was a matter defendant could not reasonably anticipate, and, having no notice or knowledge of the fail-

ure of the men to unload, it cannot be said that the defendant knowingly or wilfully confined the stock in violation of the statute.

3. Under the statute, the owner of the stock has the option of sending a caretaker in charge of the stock to load, unload, feed, water and tend the stock en route. After the man has exercised this option there is no duty on the part of the carrier to load, unload, or care for the stock, until it has actual or constructive notice that the caretaker is not giving them proper attention, and after the carrier has spotted a car at their properly equipped pens, with the caretaker in charge, it has a right to presume that he will unload the stock, and the carrier is not required to stand a guard over each caretaker to see that he gives his stock proper attention and unloads them within the statutory limit, since it cannot with due diligence and foresight be anticipated that the man in charge would not unload them." [17]

Testimony of J. H. Manning, Witness for Defendant.

One J. H. MANNING, testified that he was conductor out of Tekoa to Wallace on March 7th, 1912, and had charge of this shipment of hogs. That they left Tekoa at 6:40 A. M. on the morning of March 7th, and arrived at Wallace about 8:55 P. M. of the same day.

He further testified that Mr. John Daubert was in charge of the car. He was along to take care of the stock, look after it, and see that it was tended to. "Between Tekoa and Wallace, as we were approaching Wallace, I had a conversation with Mr. Daubert.

(Testimony of J. H. Manning.)

Knowing the time for unloading would be short after the train got there, that is two hours or over, I questioned him as to whether he would unload the stock and told him the car would be spotted immediately on arrival, for him to do so, and he said he would be done with the stock as soon as it got to Wallace as far as he was concerned, but he would find Mahoney Bros. and see that they tended to the stock when he got to Wallace. After the train got to Wallace, the first thing that we did was to put that car at the track pen so that they could unload the stock. That was nine P. M. on the 7th. I was right there myself with two brakemen when the car was spotted. The last place I saw Mr. Daubert was when he was leaving the caboose at Wallace, in the yards. The stock chute is right in the yards, that is about eight or ten car-lengths from the point where he left the caboose. I again saw the car about ten o'clock that night, about an hour after it was spotted. It was still in the stockyards right where I spotted it. The next time I saw it was the next morning between five and five-thirty o'clock. We were called to leave there at 6 o'clock. The car of hogs was billed to Wallace, Idaho, final destination.

The paper you now hand me is a way-bill for a car of hogs O. S. L. 12,890." [18]

Thereupon, by leave of the Court, counsel read from the Way-bill, as follows:

[Description of Way-Bill.]

I am now reading from the document which the witness says is the way-bill which accompanied this

(Testimony of J. H. Manning.)

stock and it is a way-bill under date of March 6th, 1912, Series 170, made by the O. W. R. & N. Co., covering a shipment from Endicott, Washington, to Wallace, Idaho, in O. S. L. Car 12,890. The name of the shipper is John Daubert, 3–6–12 and the name of the consignee and destination is Mahoney Bros., and description is eighty-eight hogs, S. L. & C., and it says a notation on the face here, "loaded at 11–30 A. M. man in charge."

Mr. MANNING further testified on cross-examination:

The car was spotted at nine P. M. on the evening of the 7th, ready to unload. It was sealed. We did not unload the stock at that time because Mr. Daubert was in charge of the stock and said he was going to notify Mr. Mahoney to unload the stock. He knew the car was to be spotted. I told him so. He was not there, to the best of my memory. I knew he had gone up town. I knew that he had abandoned the car. I also knew unless someone arrived there that night the stock would remain loaded until the next morning. I passed by the next morning and saw the car still there. I did not unload it the next morning. The car was still sealed at that time. My jurisdiction over the car ended.

Testimony of H. A. Bard, for Defendant.

One H. A. BARD testified that he was agent for defendant and was at the time of the shipment of the hogs. He testified the first time he knew anything about this shipment was about 9:15 P. M. the night of the 7th. "I knew of a car of stock arriving that

(Testimony of H. A. Bard.)

evening and I waited around the depot. Our closing hours are six o'clock, but I waited around until the conductor of 94; I waited for him to come to the depot, after he arrived at the lower yards, to ascertain whether or not any effort had been made [19] to take care of the shipment, for the express purpose of keeping away from violating the 36 hour law, and when he arrived I asked him about it. He told me that the car of stock had a man in charge, Mr. John Daubert, and Mr. Daubert was going to notify Mahoney Bros., consignee to look after the car; so long as the man was in charge of the car I considered the car would be taken care of. I did not find out the car had not been unloaded until the following morning about eight o'clock. Mahoney's plant is between one and three-quarter miles and two miles from Wallace. Where a shipment is billed to Wallace for Mahoney Bros., it is necessary to take up with Mahoney Bros., Consignee, after delivery and get them to advise what delivery they wish. The defendant has no tracks extending from Wallace to Mahoney Bros.' plant. The car moves over the Northern Pacific."

Upon cross-examination witness testified:

"I didn't make any effort other than what I have stated, on the evening of the 7th to see that the hogs were unloaded. I knew the hogs were in the car that night. The conductor told me so. I didn't know where they were. He told me that. He told me that they were spotted at the O. W. R. & N. Co.'s chute. After I learned the following morning that the car

had not been unloaded, we immediately delivered to the N. P. to go to Mahoney Bros."

Recital as to Offer and Introduction of Contract (Defendant's Exhibit I.)

By permission of the Court, counsel was permitted to read into the records certain portions, as follows:

[Portion of Contract—Defendant's Exhibit I.]

"The shipper agrees to load, unload and reload all of said stock at his own expense and risk while it is in any stockyards, whether the same be owned or controlled by said carrier or otherwise, and while on the cars or at any feeding points, or at any place where the same may be unloaded for any purpose whatever." [20]

Also section 8 of the contract reading as follows:

"The shipper expressly agrees to load, unload and care for said stock while upon the cars or premises of the carrier, in a careful and humane manner in strict compliance with the laws of the United States and of each and every State through which said stock may be transported."

Mr. LINGENFELTER.—That is objected to, for the reason that if the defendant company could enter into a contract with the shipper or the owner of the stock it would nullify and abrogate the provisions of the Act of Congress known as the "twenty-eight hour law," which could be supplemented by any contract between the parties.

The COURT.—I am going to let this go in upon the one theory, the theory which I have heretofore suggested to counsel. The objection is overruled. You may have your exception.

Recital as to Motion for Directed Verdict.

Thereupon the defendant having closed its case, a motion for a directed verdict on the grounds set forth in the motion for nonsuit heretofore set forth was made.

[Motion for Directed Verdict.]

"Now comes the plaintiff at this time and moves the Court to direct an instructed verdict in this case, No. 437, for the reason that the evidence conclusively shows that the car arrived in Wallace on the evening of March 7th at about eight P. M., was spotted in the stockyards at nine P. M., and was not unloaded on that evening, but remained on the track until the next morning, until the morning of the 8th, between 7:30 and eight o'clock, the car was sealed, no attempt being made on the part of the railroad company to unload the stock on that evening; that the stock was not delivered to Mahoney Brothers until 7:30 or 7:35 [21] on the morning of the 8th, making a period of something like 44 hours and five minutes elapsing from the time the stock was loaded at Endicott, Washington, until they arrived and were delivered to Mahoney Brothers, the consignees, at Wallace, Idaho." This Motion the Court granted.

Thereupon the defendant took an exception to the ruling of the Court, which exception was allowed.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing is according to the attached Stipulation of counsel, this day settled and allowed as de-

fendant's Bill of Exceptions.

FRANK S. DIETRICH,
Judge.

October 28th, 1912.

[Endorsed]: Filed Oct. 29, 1912. A. L. Richardson, Clerk. [22]

In the District Court of the United States for the District of Idaho, Northern Division.

AT LAW—No. 437.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Petition for Writ of Error.

And now comes the plaintiff in error, Oregon-Washington Railroad & Navigation Company, a corporation (defendant in the action), and says that on or about the 1st day of June, A. D. 1912, the above-entitled District Court entered a judgment herein in favor of the plaintiff, United States of America, and against the defendant, Oregon-Washington Railroad & Navigation Company, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Error which is attached to and filed with this petition.

WHEREFORE, this defendant prays that a Writ

of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Plaintiff in Error, Oregon-Washington Railroad & Nav. Co. [23]

[Order Allowing Writ of Error.]

On consideration of the foregoing petition and assignments of errors attached thereto, the Court does allow the Writ of Error to defendant, Oregon-Washington Railroad & Navigation Company, upon giving bond according to law in the sum of Five Hundred Dollars, which shall operate as a supersedeas bond.

Dated this 27th day of November, 1912.

FRANK S. DIETRICH,
United States District Judge for the District of Idaho, who tried said cause and entered said judgment.

[Endorsed]: Filed Nov. 27, 1912. A. L. Richardson, Clerk. [24]

In the District Court of the United States for the District of Idaho, Northern Division.

AT LAW—No. 437.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Assignment of Errors.

Plaintiff in error, the Oregon-Washington Railroad & Navigation Company, hereby assigns the following errors committed at the trial court:

1. The District Court erred in denying the motion of defendant herein for nonsuit at the close of plaintiff's case.

2. The District Court erred in refusing to direct a verdict in favor of the defendant below at the close of all the testimony.

3. The District Court erred in granting plaintiff's motion for a directed verdict.

4. The District Court erred in entering judgment for the plaintiff herein on the verdict of the jury.

WHEREFORE, plaintiff in error prays that said judgment of the District Court be reversed and the said District Court ordered to enter judgment dismissing the action.

A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Plaintiff in Error, Oregon-Washington Railroad & Navigation Co.

[Endorsed]: Filed Nov. 27, 1912. A. L. Richardson, Clerk. [25]

In the United States District Court, for the District of Idaho, Northern Division.

AT LAW—No. 437.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Supersedeas and Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Oregon-Washington Railroad & Navigation Company, a corporation, as principal, and National Surety Company (a corporation organized under the laws of the State of New York for the purpose of doing business as a surety and which has complied with the statutes of the United States authorizing it to become a surety of bonds in the Courts of the United States), as surety, are held and firmly bound unto the United States of America in the just and full sum of Five Hundred Dollars ($500.00), to be paid unto the said above-named United States of America, its attorneys, officers or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and our assigns jointly and severally by these presents.

Sealed with our seals and dated this 2d day of November, 1912.

Upon the conditions that:

WHEREAS, lately at a session of the United States District Court for the District of Idaho, Northern Division, in a suit pending in said court between the United States of America and the Oregon-Washington Railroad & Navigation Company, a corporation, a judgment [26] was rendered against said defendant upon the verdict of the jury in the sum of Two Hundred Dollars ($200.00), and costs amounting to Fifty-four Dollars and seventy cents ($54.70); and,

WHEREAS, said defendant conceiving itself aggrieved thereby, has obtained from said court a Writ of Error to reverse and correct said judgment in that behalf and a citation directed to the above-named defendant in error admonishing said defendant in error to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, within the time therein fixed; and,

WHEREAS, an order has been entered requiring said defendant to file supersedeas bond and cost bond in the aggregate sum of Five Hundred Dollars ($500.00);

NOW, the condition of the above obligation is such that if the said Oregon-Washington Railroad & Navigation Company, a corporation, shall prosecute its said Writ of Error to effect, and answer all damages and costs if it fails to make its plea good in said court, then the above obligation to be void;

otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and as a supersedeas bond.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,
By A. C. SPENCER and
HAMBLEN & GILBERT,
Its Agents and Attorneys.
NATIONAL SURETY COMPANY.
By JAMES A. BROWN,
Resident Vice-president.
[Seal] Attest: S. A. MITCHELL,
Resident Asst. Secretary.

The foregoing bond is hereby approved this 27th day of November, 1912, and the same when filed shall operate as a bond for costs on appeal and as a supersedeas bond.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Nov. 27, 1912. A. L. Richardson, Clerk. [27]

In the District Court of the United States for the District of Idaho, Northern Division.

AT LAW—No. 437.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.
The President of the United States, to the Honorable the Judge of the District Court of the United States, for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between the United States of America, plaintiff, and the Oregon-Washington Railroad & Navigation Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said defendant, the Oregon-Washington Railroad & Navigation Company, a corporation, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco on the 27th day of December, 1912, in said Circuit Court of Appeals for the Ninth Circuit, to be then and there held, that the record and proceedings [28] being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 27th day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal] A. L. RICHARDSON,
Clerk U. S. District Court, for the District of Idaho.

Allowed by: FRANK S. DIETRICH,
Judge. [29]

[Endorsed]: No. 437. U. S. District Court, Northern Division, District of Idaho. Oregon-Washington Railroad & Navigation Co., Plff. in Error, vs. United States of America, Deft. in Error. Writ of Error. Filed Nov. 27, 1912. A. L. Richardson, Clerk. [30]

In the District Court of the United States for the District of Idaho, Northern Division.

AT LAW—No. 437.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Idaho,—ss.

To the United States of America, and to Its Attorney, C. H. LINGENFELTER, Greeting:

You are hereby cited and admonished to be and

appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, District of Idaho, wherein the Oregon-Washington Railroad & Navigation Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Coeur d'Alene in said District, this 27th day of November, 1912.

FRANK S. DIETRICH,
Judge.

Attest: A. L. RICHARDSON,
Clerk. [31]

Service of the within and foregoing Citation hereby acknowledged by copy this 27th day of November, 1912.

C. H. LINGENFELTER,
United States Attorney for the District of Idaho.

[Endorsed]: No. 437. In the United States District Court, District of Idaho, Northern Division. Oregon-Washington Railroad & Navigation Company, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation. Filed November 27th, 1912. A. L. Richardson, Clerk. [32]

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. [33]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States for the District of Idaho, Northern Division.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 34, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $23.60, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said Court this 9th day of December, 1912.

[Seal] A. L. RICHARDSON,
Clerk. [34]

[Endorsed]: No. 2237. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

Filed January 3, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time Ten Days to File Record in Circuit Court of Appeals.]

In the United States District Court, for the District of Idaho, Northern Division

No. 437.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

This matter coming on for hearing upon the application of the plaintiff in error for an extension of time within which to file its transcript in the United States Circuit Court of Appeals for the Ninth Circuit, and to docket said case, and the Court being satisfied that good cause exists for granting such extension,—

IT IS ORDERED, that said time for filing said transcript and docketing said case be, and the same is hereby, extended for a period of ten days.

Done this 27th day of December, 1912.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: No. 2237. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time Ten Days to File Record Thereof and to Docket Case. Filed Jan. 6, 1913. F. D. Monckton, Clerk.

IN THE

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United States Circuit Court of Appeals for the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,
Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error

No. 2237

Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division

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OPENING BRIEF OF PLAINTIFF IN ERROR

OPENING BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action against the Plaintiff in Error under the Twenty-eight Hour Law (*Act June 29th*, 1906, *C.* 3584, 34 *Stat.* 607), involving the shipment of a car of hogs from Endicott, in the State of Washington, to Wallace, in the State of Idaho. It was undisputed that the hogs were loaded at Endicott at 11:30 a. m. (*Trans.*

pg. 14), were accompanied by a man in charge named John Daubert, who executed the 36-hour release provided in the statute. The shipment arrived at Wallace about 8:55 p. m. the following day (*Trans. pg.* 19), and was almost immediately spotted at the stock chute at the stock yards of the Plaintiff in Error at Wallace (*Trans. pg.* 20).

It is likewise undisputed that the car of hogs was not unloaded until the following morning, when the car was transferred to the Northern Pacific Railway Company, moved about a mile and a half to their stock pens, where it was unloaded by the consignee, Mahoney Bros. (*Trans. pg.* 17).

Upon the trial the Defendant in Error, being the plaintiff below, established the foregoing facts, but in addition it appeared that the shipment of the car of hogs was accompanied by John Daubert as caretaker, who went along with the shipment for the express purpose of looking after the hogs (*Trans. pg.* 15), and that just before the train had arrived at Wallace, this caretaker asked the conductor of the train to spot the car at the stock yards. Immediately after the arrival of the train, this caretaker hunted up Mr. Mahoney of Mahoney Bros., the consignee of the shipment, and told him that the car had arrived and was spotted at the stock yards and that the time was pretty nearly up to unload them (*Trans.* pg. 15).

At the close of the Government's testimony the Plaintiff in Error moved the Court for a non-suit, on the ground that the failure to unload the car within the statutory limit was due to unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, and for the further reason that such confinement was not done knowingly or wilfully within the meaning of the statute. This motion the Court denied (*Trans. pg.* 18).

Thereupon the Plaintiff in Error introduced certain testimony tending to show that the confinement of the hogs in the car beyond the statutory limit, was due to unavoidable causes and was not done wilfully or knowingly within the meaning of the statute, and at the close of all the testimony the Plaintiff in Error moved for a directed verdict in its favor and this motion was denied by the Court (*Trans. pg.* 24).

The Defendant in Error likewise moved for a directed verdict at the close of the evidence, which motion the Court granted (*Trans. pg.* 24).

SPECIFICATIONS OF ERROR.

The Plaintiff in Error hereby designates the following errors which it relies upon in this case:

1. The District Court erred in denying the motion of Plaintiff in Error for a non-suit at the close of the Government's case.

2. The District Court erred in refusing to direct a verdict in favor of the Plaintiff in Error at the close of all the testimony.

3. The District Court erred in granting Defendant in Error's motion for a directed verdict.

4. The District Court erred in entering judgment for the Defendant in Error on the verdict of the jury.

ARGUMENT.

For convenience we will refer to the parties to this cause hereafter, as the Railroad Company, instead of the Plaintiff in Error, and the Government, instead of the Defendant in Error.

From the foregoing statement of the case it will be seen at once that no question is raised as to the confinement of the car of hogs beyond the statutory limit. The Specifications of Error all go to one question and will be discussed together. That question is, did the Railroad Company either at the close of the Government's case or at the close of all the testimony show that the confinement of the hogs beyond the 36 hours was due to unavoidable causes within the terms of the statute, or that such confinement had not been done knowingly and wilfully within the meaning of the statute.

Before discussing the facts in the case we desire to suggest certain general propositions which, in our opinion, have become well established by the Courts.

In the first place, it is not mere confinement beyond the statutory period which fixes the liability of the Railroad Company, but such confinement must be done knowingly and wilfully. The Courts have frequently defined these two words as used in the statute under consideration. "Knowingly" and "wilfully" have been defined as "intentionally" or "purposely."

> *U. S. vs. Sioux City Stock Yards Co.*, 162 *Fed.* 556.

The word "wilfully" has been defined as "voluntarily" or "intentionally."

> *U. S. vs. Atchison, T. & S. F. Ry. Co.*, 166 *Fed.* 160.

Again it has been said:

"'Knowingly' evidently means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as in the case where one carrier receives from another a car loaded with cattle, and, with knowledge of how long they then had been confined in the car without rest, water or food, prolongs the confinement until the statutory limit is exceeded. 'Wilfully' means something not expressed by 'knowingly', else both would not be used conjunctively. * * * But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of a carrier is hardly within the pale of actual

experience or reasonable supposition. So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."

St. Louis & S. F. R. Co. vs. U. S., 169 *Fed.* 69.

The foregoing statement has been quoted and approved in the following cases:

U. S. vs. Stock Yards Terminal Ry. Co., 178 *Fed.* 19;

St. Joseph Stock Yards Co. vs. U. S., 187 *Fed.* 104;

Chicago, B. & Q. R. Co. vs. U. S., 194 *Fed.* 342.

Secondly, the words "due diligence and foresight" have been construed as follows:

"The measure of 'due diligence and foresight' is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. And the 'due diligence and foresight' which condition the anticipation and avoidance of the other incidental or unavoidable causes specified in this law, is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under like circumstances. An 'accidental or unavoidable cause' which cannot be avoided by the exercise of due diligence

and foresight in the meaning of the law is a cause which reasonably prudent and careful men, under like circumstances, do not and would not ordinarily anticipate, and whose effects under similar circumstances they do not and would not ordinarily avoid."

Chicago, B. & Q. R. Co. vs. U. S., 194 *Fed.* 342-344.

A third and very important principle which the Courts have read into this Act is this: That the legal presumption in cases of this kind in determining whether a carrier has acted "knowingly" or "wilfully," or without due diligence and foresight, is that men ordinarily discharge their duties and comply with the law. Hence, it has been held that one carrier in receiving a stock shipment from another, in the absence of notice to the contrary, has the right to rely on the presumption that the preceding carrier had discharged its duty.

St. Joseph Stock Yards Co. vs. U. S., 187 *Fed.* 104-106.

With these general principles in mind, let us briefly review the facts, which in our view establish beyond doubt that the Railroad Company in this case did not act "knowingly" and "wilfully" in confining the car of hogs beyond the statutory limit, and further showed that said confinement was due to an unavoidable cause which the Railroad Company could not reasonably anticipate. It must be remembered in the first place that this shipment of hogs was in charge of a caretaker repre-

senting the consignor, and that the only purpose of his going along with the car was to look after the hogs and take proper care of them. Besides this, the bill of lading expressly stipulated that the consignor was to do everything required in the way of feed, water, rest and unloading the hogs, and while we are aware that this stipulation as against the Government, would not relieve the Railroad Company of its duty under the 28 Hour Law, still we insist that it is a circumstance which must be taken into consideration along with the other facts of the case in determining whether the Railroad Company acted with the prudence and foresight required by the statute.

This shipment was consigned to Mahoney Bros., at Wallace, Idaho. No directions had been given to the Railroad Company by the consignee as to where the hogs were to be unloaded. It would seem, therefore, that in the absence of such directions, the Railroad Company could do but one thing, and that was to spot the car for unloading at its own stock pens in Wallace. Again, this was done at the direction and upon the express request of the man in charge of the shipment. Now it is undisputed that the man in charge of this car told the conductor of the freight train which brought it into Wallace, that he was going to notify the consignee to unload the stock (*Trans. pg.* 20). And besides this, the man in charge of the car actually did notify one of the Mahoney

Bros., that the car had arrived, was spotted at the stock chute and that the 36 hours would soon be up.

Other very convincing circumstances showing that this railroad company was endeavoring to comply with the law and was taking reasonable precautions to prevent the confinement of the hogs beyond the statutory limit, is found in the testimony of H. A. Bard, the Agent for the Railroad Company at Wallace (*Trans. pg.* 21). Bard testified that, although his usual time for leaving the station of the Railroad Company was six o'clock, he waited around until after nine o'clock until the train transporting this car of hogs arrived at Wallace. That he knew of the expected arrival of this car and that he waited around for the conductor for the express purpose of keeping away from violating the 36 Hour Law. We ask the Court to read this testimony carefully.

The conductor's jurisdiction over the car of course terminated when the car was spotted at the stock yards and, as a matter of fact, his attention was not again directed to it until the following morning when he was going out on another train.

As soon as the agent became advised the following morning that the car had not been unloaded he immediately communicated with Mahoney Bros., and at their direction had the car transferred to the Northern Pacific, whence it was taken to Mahoney Bros.' own stock yards (*Trans. pgs.* 22 *and* 23).

It seems to us, in view of the foregoing circumstances, that the Railroad Company having completed the shipment of the car of hogs, and having made a constructive delivery of the same to the consignee, certainly had a right to assume that the consignee, or at least the man in charge of the car, who was a representative of the owner, would attend to unloading the hogs as provided in the bill of lading. At least it seems to us the Railroad Company had the right to rely upon such assumption and upon the presumption that the man in charge of the car would perform his duty, until it had actual notice that the car had not been unloaded.

It should be remembered that an entirely different situation existed in this case from that where it is necessary to unload the cattle or hogs during shipment. It will be noticed that the title of the 28 Hour Act reads: "An Act to prevent cruelty to animals *while in transit* by railroad * * *." In the case at bar the transit or carriage had ended. The car was at the disposition of the consignee and nothing more remained for the Railroad Company to do in connection with the shipment unless it can be said that under the Act it was the duty of the Railroad Company to unload the hogs. But if it was the duty of the Railroad Company to unload the hogs it was likewise the duty of the Railroad Company to give them rest, water and feed. The statute makes no distinction between these requirements. The hogs

must be unloaded, rested, watered and fed. Now the mere suggestion that it was the duty of the Railroad Company under these circumstances not only to unload, but to feed, water and rest the hogs, shows the absurdity of the proposition, and to our mind demonstrates that it was only the purpose of the Act to require unloading, etc., etc., while the shipment was in transit. We presume the idea of Congress was this; that after cattle or hogs had been confined in transit on a moving train for 28 or 36 hours at the outside, as the case might be, they would be in no condition to resume the journey until they had been unloaded, watered and fed and rested for five hours. We seriously doubt if Congress in this Act attempted to exert, or in fact could lawfully exert any control over the shipment after it had reached its destination and there had been a delivery, actual or constructive to the consignee.

But even assuming that this construction of the Act for which we are contending is not the true one, still we insist that the Railroad Company is not liable because the confinement of the hogs was due to an unavoidable cause which could not be anticipated or avoided by the exercise of due diligence and foresight.

As stated in St. Joseph Stock Yards Company vs. U. S., *supra*, the legal presumption is that men ordinarily discharge their duties and comply with the law. The shipment of hogs having reached its destination,

and been spotted where they could have been easily unloaded, and the consignee having been notified of its arrival, under circumstances which would lead the Railroad Company to believe that the hogs would be unloaded promptly, it seems to us that the Railroad Company had the right to assume that this would be done, at least until it had actual notice to the contrary.

While the statute under consideration is not criminal but only penal in its nature, still we feel that the Courts should also recognize an honest attempt upon the part of the Railroad Company to comply with the law. The evidence in this case not only fails to disclose any lack of diligence or foresight, or due care in respect to this shipment of hogs, but on the contrary shows a very commendable anxiety on the part of the employees of the Railroad Company to avoid a violation of the Act. The conductor in charge of the freight train took pains to comply immediately with the request of the caretaker to spot the car for unloading, and took further pains to communicate to Mr. Bard, the Agent, that the car had been spotted and that the caretaker had gone to notify the consignee. Mr. Bard, the Agent, showed his anxiety to avoid a violation of the law by remaining at the station long after his customary time for leaving and by ascertaining from the conductor what arrangements had been made for unloading the stock. Under these circumstances it seems to us unjust to punish the

Railroad Company merely because it assumed that the consignee and the caretaker—the two men most interested in giving the hogs proper care—failed to perform their duty. Instead of there being an intentional and wilful confinement of the hogs beyond the limit, the evidence discloses a *bona fide* attempt upon the part of the railroad employees to comply with the law.

The Court below should have either granted the motion for non-suit, or at least directed a verdict in favor of the Railroad Company, and we respectfully submit that the judgment of the trial Court should be reversed, with instructions to dismiss the action.

Respectfully submitted,

A. C. SPENCER,

HAMBLEN & GILBERT,

Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY a Corporation,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2237.

Upon Writ of Error in the United States District Court of Idaho, Northern Division.

BRIEF OF DEFENDANT IN ERROR

Defendant in Error, the United States answering the brief of Plaintiff in Error, finds that the issues are compassed to two propositions, as follows:

1. Was it the duty of the railroad company to properly care for the hogs on their arrival in Wallace, Idaho, on the evening of March 7, 1912 before the 36-hour period expired, notwithstanding the car was accompanied by a caretaker who informed the conductor of the train in which the car containing the hogs was carried, that he would notify the consignee to unload the stock, or did the duty devolve upon the railroad company to unload for rest, water and feed upon the noncompliance by the caretaker and consignees?

2. Was the confinement of the stock beyond the time limit due to an unavoidable cause which could not be anticipated or avoided by the exercise of due diligence and foresight?

The primary purpose of the act known as "The 28-hour law" is to prevent cruelty to animals while in transit and under the care and control of the carrier It is a humane act. The contractural rights of the owner of the stock and the railroad company are ancillary to prevention against cruelty to the stock by long confinement and improper attention.

"The statute was not primarily intended for the benefit of the owner. Indeed it is restrictive of their rights. The penalty does not go to the consignor, but to the United States, for each failure to unload cattle, regardless of who may own them, and even if the owner consented to their confinement beyond a period of 36 hours. The title of the act is 'To prevent cruelty to animals in transit,' its declared intent being to prohibit their continuous confinement beyond a period of twenty-eight hours, except upon the contingencies hereinbefore stated. Regardless of the number of shipments, at any time and place where they are wilfully and knowingly confined beyond the lawful period, there is a violation of the statute as to the animal or animals then and there in custody for transit in interstate commerce. X X."

220 *U. S* 94, 55 *L. Ed* 384.

"The act to prevent cruelty to animals while in transit," approved June 29, 1906, (34 Stat. at L. 607, Chap. 3594, U. S. Comp. Stat. Supp. 1909, p. 1178), provides:

"Sec. 1. That no railroad, . . . whose road forms any part of a line of road over which cattle . . . or other animals shall be conveyed . . . (in interestate commerce)

. . . shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water and feeding, for a period of at least five consecutive hours, unless prevented . . . by unavoidable causes . . . *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated.

"Sec. 2. That animals so unloaded shall be properly fed and watered during such rest. . . .

"Sec. 3. That any railroad . . . who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars.

"Sec. 4 That the penalty created by the preceding section shall be recovered by civil action in the name of the United States. . . ."

. Briefly adverting to the evidence, the testimony of J. H. Manning, conductor in charge of the train, disclose that the caretaker was to inform Mahoney Brothers, consignees, of the

arrival of the stock at Wallace, Idaho. (Trans. 20.) That the caretaker intended to and did abandon the stock. The conductor also knew that the stock would remain loaded until the next morning and that he passed by the next morning and saw the stock still there; that the car was not unloaded until the next morning. (Trans. 21) when they were delivered to Mahoney Brothers having been confined for a period of forty-four hours and five minutes from the time the stock was loaded at Endicott, Washington, until they arrived and were delivered to the consignees at Wallace.

The agent at Wallace also knew that the hogs were confined in the car at Wallace during the night of their arrival and that the conductor so informed him. The uncontradicted testimony is that the company had knowledge that the car remained unloaded and that the time had expired, and that no attempt was made by the railroad company to care for them, but that its officers and agents knowingly, wilfully and intentionally permitted the stock to remain in the car beyond the thirty-six hour period.

The word knowingly is used in the twenty-eight hour law in its commonly accepted terms and sense, and means with a knowledge of the facts which, taken together, constitute the failure to comply with the statute.

Wilfully means something not expressed by knowingly, else both would not be used conjunctively. And presumptively, it means something not expressed by willingly, else the change would not have been made in the statute. But it does not mean with the intent to injure the cattle or to inflict loss upon the owner because such intent on the part of such carrier is hardly within the pale of actually expressed or reasonable supposition.

U. S. vs. Union Pac. Ry. Co., 169 *Fed.* 65.

So giving effect to these considerations we are pursuaded that it means purposely or obstinately, and is designed to describe the attitude of a carrier, who, having a free will or chance, either intentionally disregards the statute or is primarily indifferent to its requirements.

St. Louis & San Francisco Ry. Co. vs. United States, 169 *Fed.* 71.

The word wilfully in the twenty-eight hour law does not require that there should be an evil intent to constitute the offense, but it is sufficient if the act was done knowingly and purposely.

U. S. vs N Y. Cen. & Hudson River Ry., 165 *Fed.* 833.

A carrier which receives live stock from a connecting carrier, after the animals have been already confined beyond the period prescribed by the twenty-eight hour law, and continues their transportation for several hours before unloading, is liable for negligence *per se*. Whether the carrier knowingly and wilfully fails to comply with the statute is a question for submission to the jury.

U. S. vs. N Y. Cen. & Hudson River Ry., 156 *Fed.* 249
U. S. vs. Lehigh Valley R. R. Co., 184 *Fed.* 871, *affirmed* 187 *Fed.* 1006.
U S. vs. St Joseph Stock Yards Co., 181 *Fed.* 625.
U. S. vs. North Pac. Terminal Co., 181 *Fed.* 879.

A similar case, in many respects, was passed upon by the Eighth Circuit in the case of Chicago, Burlington & Quincy Ry. Co. vs. U. S., 195 Fed. 241, in which the following pertinent language is used by Sanborn, Circuit Judge:

" * * * * * The facts that their owner or caretaker,

who accompanies them, agrees to care for, feed and water them on their way, and that food and water with which he might have performed his agreement were easily accessible to him, are not sufficient to establish this excuse, where the animals are knowingly and wilfully confined more than twenty-eight hours and they do not actually receive proper food, or water or space and opportunity to rest.

"Nor is it essential to the recovery of the penalty that proof should be made that the defendant knew that the animals did not receive proper food, water or space to rest in the cars which transported them. It is enough that the railroad company knowingly and wilfully confined them more than twenty-eight hours, and the animals did not have proper food, water, space and opportunity to rest in the cars that carried them during the transportation."

The second proposition merits no consideration as the question of unavoidable cause which could not be anticipated or avoided by the exercise of due diligence and foresight is foreclosed by the knowledge of the employes that the hogs were in the car and that the car was spotted in the chutes of the railroad company for unloading, and the agents and employes voluntarily permitted them to remain in the car at Wallace, Idaho, until the next morning at 8:30 or 9:00 o'clock, when, at the request of Mahoney Brothers, consignees, the hogs were unloaded.

Section 2 of the act makes it obligatory on the company, in default of the owner or person having the custody thereof, to unload the same for the purposes mentioned in the statute, and such company shall have a lien upon such animals for food, care and custody furnished.

It is immaterial, in an action to recover a penalty under the

statute, whether failure to feed and water the stock is due to the default of the shipper or the carrier. The act requires the shipper to feed and water the stock in the first instance, but, if he fail, the carrier must do it for him.

U. S. vs. Louisville & Nashville Ry. Co., 18 *Fed.* 480.
U. S. vs. O. S. L. Ry. Co, 160 *Fed.* 526.

No error having been made by the Court in instructing a verdict for the plaintiff, the judgment being for the right party, should be affirmed.

Respectfully submitted,

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